

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

JANICE LANGFORD

PLAINTIFF

vs.

No.
1:00CV255-D-A

AMORY PUBLIC SCHOOL DISTRICT

DEFENDANTS

OPINION

Presently before the court is the Defendant's motion for partial summary judgment. Upon due consideration, the court finds that the motion should be granted, and the Plaintiff's claim for retaliatory discharge under Mississippi law, as well as her claims for disparate treatment based on race under 42 U.S.C. § 1981 and the Equal Protection Clause of the Fourteenth Amendment shall be dismissed. The Plaintiff's claim for unpaid overtime under the Fair Labor Standards Act was not addressed in this motion, and is therefore still pending before the court.

A. Factual Background

The Plaintiff, Janice Langford, was employed by the Defendant Amory Public School District as a teacher's assistant and bus driver. In June of 1999, the Defendant informed the Plaintiff that her position as a teacher's assistant would not be renewed for the following school year. She remains employed by the Defendant as a bus driver.

The Plaintiff filed this action on August 1, 2000, alleging that her termination from the position of teacher's assistant constituted retaliatory discharge under Mississippi law, as well as unlawful disparate treatment based on race, pursuant to 42 U.S.C. § 1981 and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. In addition, the Plaintiff seeks relief under the Fair Labor Standards Act for unpaid overtime. On June 8, 2001, the Defendant filed the pending motion for partial summary judgment, seeking judgment as a matter of law with regard to the Plaintiff's claims for retaliatory discharge and disparate treatment.

B. Summary Judgment Standard

A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986). Under Rule 56(e) of the Federal Rules of Civil Procedure, the burden then shifts to the non-movant to go beyond the pleadings and "by...affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." Celotex Corp., 477 U.S. at 324. That burden is not discharged by mere allegations or denials. Fed. R. Civ. P. 56(e).

While all legitimate factual inferences must be viewed in the light most favorable to the non-movant, Rule 56(c) mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 2513, 91 L. Ed. 2d 202 (1986); Celotex Corp., 477 U.S. at 322. Before finding that no genuine issue for trial exists, the court must first be satisfied that no reasonable trier of fact could find for the non-movant. Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986).

C. Discussion

1. The Plaintiff's Claim for Retaliatory Discharge Under Mississippi Law

Mississippi recognizes a narrow public policy exception to the employment at will doctrine whereby an employer may not discharge an employee in retaliation for the employee's refusal to participate in an illegal act. McArn v. Allied Bruce-Terminix Co., 626 So. 2d 603, 606 (Miss. 1993); Laws v. Aetna Fin. Co., 667 F. Supp. 342, 349 (N.D. Miss. 1987).

The Plaintiff asserts a claim for retaliatory discharge under McArn, and states that she was terminated from her position as a teacher's assistant for her refusal to tube feed a handicapped student.¹ In asserting this claim, however, the Plaintiff does not assert that her tube feeding the student would constitute a criminal illegality; rather, she argues that the McArn exception protects employee conduct other than direct refusal to participate in a criminal act.

The McArn exception has never been held to protect activity other than refusal to participate in, or report, criminal acts. See, e.g., Rosamond v. Pennaco Hosiery, Inc., 942 F. Supp. 279, 285-87 (N.D. Miss. 1996). Here, the Plaintiff does not allege that an assistant teacher's tube feeding a handicapped student constitutes a criminally illegal act. Instead, in her deposition, the Plaintiff seemingly is solely concerned about potentially incurring civil liability for tube feeding the student. See Plaintiff's Deposition at pp. 136-37. The McArn exception, however, does not protect employees who refuse to engage in acts that may subject them to civil liability, as opposed to criminal liability. Rosamond, 942 F. Supp. at 287; see Spencer v. Lowe's Home Ctrs., No. 1:98CV11-B-D, 1999 U.S. Dist. LEXIS 4265, at *9 (N.D. Miss. March 29, 1999) ("[F]ederal courts have consistently refused to interpret McArn's public policy exception to include the refusal to engage in civil illegality."). As such, the court finds that the Plaintiff cannot maintain a cause of action for retaliatory discharge under McArn and its progeny. There is no genuine issue as to any material fact concerning this claim, and the Defendant is entitled to judgment as a matter of law.

2. The Plaintiff's Claims of Disparate Treatment Based on Race

The Plaintiff asserts claims for disparate treatment based on race under 42 U.S.C. § 1981 and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Specifically, the Plaintiff, a white female, claims that she was treated differently than Diane Standifer, an

¹Tube feeding is a method of providing nutrition to people who cannot sufficiently obtain calories by eating or to those who cannot eat because they have difficulty swallowing.

African-American assistant teacher at another school within the Defendant District.

In order to establish a *prima facie* case of disparate treatment, the Plaintiff must show that:

- (1) she is a member of a protected class;
- (2) she was qualified for her position;
- (3) she was subjected to an adverse employment action; and
- (4) that others, similarly situated, were treated more favorably.

Okoye v. The Univ. of Texas Houston Health Sci. Ctr., 245 F.3d 507, 512-13 (5th Cir. 2001). Once the Plaintiff has established a *prima facie* case, the burden shifts to the Defendant to produce evidence that the Plaintiff was terminated for legitimate, non-discriminatory reasons. Id. at 513. If the Defendant is able to produce a legitimate reason, then the presumption of discrimination vanishes, and the Plaintiff must demonstrate that a genuine issue of material fact exists and the reasons offered by the Defendant were merely a pretext for discrimination. Id. Further, to establish disparate treatment, the Plaintiff must show that the employer gave preferential treatment to another employee under nearly identical circumstances, and that the misconduct for which the Plaintiff was discharged was nearly identical to that engaged in by other employees. Id. at 514.

Assuming, *arguendo*, that the Plaintiff can establish a *prima facie* case, the court finds that summary judgment is appropriate because the Plaintiff cannot establish that the Defendant gave preferential treatment to another employee under nearly identical circumstances, or that the misconduct for which the Plaintiff was discharged was nearly identical to that engaged in by another employee.

The Plaintiff claims that Diane Standifer was given preferential treatment and was not terminated for engaging in nearly identical conduct as that which led to the Plaintiff's termination. The circumstances under which the Plaintiff and Diane Standifer worked, however, were not nearly identical; nor did Standifer engage in conduct nearly identical as that which led to the Plaintiff's termination. The Plaintiff's disparate treatment claims, therefore, must fail. Diane Standifer worked at a different school and under a different teacher and principal than did the Plaintiff. Further, during the timeframe the

decision was made to terminate the Plaintiff, it was the individual classroom teachers who made the decision as to whether their assistant teachers would tube feed handicapped students; there was no District-wide policy concerning tube feeding.

In determining what constitutes the "nearly identical circumstances" that will support a claim for disparate treatment, federal courts have held that employees are not similarly situated when they are under different supervisors. See, e.g., Nieto v. L & H Packing Co., 108 F.3d 621, 623 (5th Cir. 1997); Mitchell v. Toledo Hosp., 964 F.2d 577, 583 (6th Cir. 1992). Moreover, the Plaintiff's supervisory classroom teacher allowed the Plaintiff to tube feed, whereas Diane Standifer's teacher performed this task herself and never asked Ms. Standifer to do so until after the date of the Plaintiff's termination; even then, Standifer did not, and has not, refused to tube feed. As such, the court finds that Diane Standifer was not given preferential treatment under nearly identical circumstances as those that led to the Plaintiff's termination, and neither was the misconduct for which the Plaintiff was discharged nearly identical to that engaged in by Standifer. Summary judgment, therefore, is appropriate on the Plaintiff's claims of disparate treatment based on race under 42 U.S.C. § 1981 and the Equal Protection Clause of the Fourteenth Amendment.

D. Conclusion

In sum, the Defendant's motion for partial summary judgment shall be granted. The Defendant has shown that there is no genuine issue as to any material fact and that they are entitled to judgment as a matter of law as to the Plaintiff's claim for retaliatory discharge under Mississippi law, as well as her claims for disparate treatment based on race under 42 U.S.C. § 1981 and the Equal Protection Clause of the Fourteenth Amendment.

A separate order in accordance with this opinion shall issue this day.

This the ____ day of August 2001.

Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

JANICE LANGFORD

PLAINTIFF

vs.

No.
1:00CV255-D-A

AMORY PUBLIC SCHOOL DISTRICT

DEFENDANTS

ORDER

Pursuant to an opinion issued this day, it is hereby ORDERED that

- (1) the Defendant's motion for partial summary judgment (docket entry 48) is GRANTED;
- (2) the Plaintiff's claim for retaliatory discharge under Mississippi law is DISMISSED WITH PREJUDICE;
- (3) the Plaintiff's claim for disparate treatment based on race, under 42 U.S.C. § 1981 and the Equal Protection Clause of the Fourteenth Amendment is DISMISSED WITH PREJUDICE; and
- (4) the Plaintiff's remaining claim, for unpaid overtime under the Fair Labor Standards Act shall proceed to trial.

All memoranda, depositions, declarations and other materials considered by the court in ruling on this motion are hereby incorporated into and made a part of the record in this action.

SO ORDERED, this the ____ day of August 2001.

Chief Judge